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GETAROUND INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BRIAN HOFER and JONATHAN HOFER,

Plaintiff,

1

KYLE EMLEY, a Contra Costa County Deputy Sheriff, in his individual capacity, WILLIAM ODOM, a Contra Costa County Deputy Sheriff, in his individual capacity, BRANDON GANT, a Contra Costa County Deputy Sheriff, in his individual capacity, DEFENDANT DOE 1, a Contra Costa County Deputy Sheriff, in his individual capacity, COUNTY OF CONTRA COSTA, a municipal corporation, CITY OF SAN JOSE, a municipal corporation, VIGILANT SOLUTIONS, INC., GETAROUND, INC., and Does 1 to 50.

Defendants.

Case No. 3:19-cv-02205

**DEFENDANT GETAROUND, INC.'S
NOTICE OF MOTION AND MOTION
TO COMPEL ARBITRATION AND
DISMISS OR STAY LITIGATION**

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NOTICE OF MOTION AND MOTION

**TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT
OF CALIFORNIA AND TO PLAINTIFFS BRIAN HOFER AND JONATHAN HOFER
AND THEIR ATTORNEYS OF RECORD:**

5 **PLEASE TAKE NOTICE** that on August 15, 2019, or as soon thereafter as the matter
6 may be heard, before the Honorable Judge Jacqueline Scott Corley, Courtroom F, United States
7 District Court, Northern District of California, 450 Golden Gate Avenue, 15th Floor, San
8 Francisco, California, Defendant Getaround, Inc. (“Getaround”) will and hereby does move the
9 Court for an order (1) compelling Plaintiffs to resolve the instant matter through binding arbitration
10 pursuant to the Federal Arbitration Act, 9 U.S.C. § 4; and (2) dismissing Getaround from this action,
11 or in the alternative, staying the litigation pending arbitration. Defendant’s Motion is made on the
12 grounds that Plaintiff Brian Hofer and Getaround entered into a valid and enforceable agreement
13 to settle any dispute arising out of the use of Getaround’s application through binding arbitration,
14 and the Federal Arbitration Act compels that the parties’ agreement in this regard be upheld and
15 that the instant litigation be dismissed, or in the alternative, stayed pending arbitration.

16 The motion is based on this Notice of Motion and Motion, the accompanying Memorandum
17 of Points and Authorities, the accompanying Declaration of Garrett Kadillak and exhibits thereto,
18 the papers on file in this action, oral argument at the hearing, and any other matter which the Court
19 deems appropriate.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

3 Plaintiffs' attempt to litigate their asserted negligence cause of action against Getaround in
4 this Court is precluded by Plaintiff Brian Hofer's acceptance of Getaround's Terms of Service
5 ("ToS"). The ToS contains an express arbitration clause, stating that "we each agree to resolve any
6 claim, dispute, or controversy . . . arising out of or in connection with or relating to this Agreement,
7 or the breach or alleged breach thereof . . . by binding arbitration." Declaration of Garrett Kadillak
8 ("Kadillak Decl."), ¶ 6 and Exhibit B thereto. The only connection that Getaround has with the
9 plaintiffs is that Plaintiff Brian Hofer ("Mr. Hofer") accepted the ToS in 2017 prior to renting a
10 vehicle on the Getaround platform that he was driving while his brother, Plaintiff Jonathan Hofer,
11 was a passenger, on the day he was pulled over by the police, as alleged in the Complaint. Because
12 their alleged claims against Getaround undeniably arise out of, are connected with, and relate to the
13 ToS, they are subject to the binding arbitration provision.

14 The Federal Arbitration Act (“FAA”) and United States Supreme Court precedent mandate
15 that arbitration agreements be enforced according to their terms. 9 U.S.C. § 1, *et seq.* Mr. Hofer
16 and Getaround entered into a valid and binding arbitration agreement and Plaintiffs’ negligence
17 claim falls directly within the scope of that agreement. Accordingly, Getaround respectfully
18 requests that the Court: (1) compel arbitration of Plaintiffs’ claim against Getaround and (2) dismiss
19 Plaintiffs’ Complaint as to Getaround or, in the alternative, stay this litigation as required by the
20 FAA.¹

II. ISSUES TO BE DECIDED (LOCAL RULE 7-4(A)(3))

22 Should Plaintiffs be compelled to arbitrate their cause of action for negligence against
23 Getaround pursuant to an express arbitration provision in Getaround's Terms of Service?

III. STATEMENT OF RELEVANT FACTS

25 As alleged in the Complaint, Mr. Hofer rented a vehicle using the Getaround application on
26 his smartphone on November 21, 2018. See Compl., ¶¶ 15, 37. Subsequently on November 25,

27 1 In the event the Court denies this motion to compel arbitration, Getaround requests the
28 opportunity to file a motion to dismiss Getaround from the instant action pursuant to Federal
Rule of Civil Procedure 12(b)(6).

1 2018, Plaintiffs were stopped by a Contra Costa County Sheriff deputy while driving the Getaround
2 vehicle. *See id.* at ¶ 16. The officer informed Plaintiffs that the vehicle was on a police “hot list”
3 for stolen vehicles. *See id.* at ¶ 36. The officer gained access to Mr. Hofer’s phone and verified
4 that he had rented the car from Getaround. *See id.* at ¶¶ 40–41.

5 Getaround is an app-based, peer-to-peer vehicle rental marketplace that allows drivers to
6 rent cars from private car owners, and owners to rent their cars for payment. Kadillak Decl., ¶ 2.
7 Mr. Hofer created a user account on the Getaround application on March 19, 2017. Kadillak Decl.,
8 ¶ 4. By creating an account and using the Getaround application, Mr. Hofer agreed to Getaround’s
9 Terms of Service (the “ToS”). *Id.* Mr. Hofer most recently accepted Getaround’s ToS on July 12,
10 2018. *See* Kadillak Decl., ¶ 5, Ex. A. The operative ToS included the following express arbitration
11 terms:

12 READ THIS SECTION CAREFULLY BECAUSE IT REQUIRES
13 THE PARTIES TO ARBITRATE THEIR DISPUTES AND
14 LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF
15 FROM COMPANY. For any dispute with Company, you agree to
16 first contact us at [email] and attempt to resolve the dispute with us
17 informally. In the unlikely event that Getaround has not been able to
18 resolve a dispute it has with you after attempting to do so informally,
19 we each agree to resolve any claim, dispute, or controversy
(excluding any Getaround claims for injunctive or other equitable
relief) arising out of or in connection with or relating to this
Agreement, or the breach or alleged breach thereof (collectively,
“Claims”), by binding arbitration by the American Arbitration
Association (“AAA”) in City and County of San Francisco,
California under the commercial rules then in effect for the AAA,
except as provided herein.

20 Kadillak Decl., Ex. A. The first page of the ToS also states in bolded and capitalized text: “**THIS**
21 **AGREEMENT CONTAINS A MANDATORY INDIVIDUAL ARBITRATION AND**
22 **CLASS ACTION/JURY TRIAL WAIVER PROVISION THAT REQUIRES THE USE OF**
23 **ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE DISPUTES, RATHER**
24 **THAN JURY TRIALS OR CLASS ACTIONS.**” *Id.*

25 **IV. THE COURT SHOULD COMPEL PLAINTIFFS TO ARBITRATE THEIR**
26 **CLAIMS**

27 Plaintiffs raise one cause of action against Getaround for negligence. Specially, Plaintiffs
28 allege that Getaround was negligent by “breach[ing] its duty to update San Jose and/or other police

1 agencies that the car it rented to Brian and Jonathan was not stolen or had been returned.” Compl.,
2 ¶ 80.² Since their negligence claim arises directly out of Mr. Hofer’s rental of a vehicle through
3 the Getaround app, it is subject to the mandatory arbitration provision in the ToS.

4 **A. The FAA and Federal Caselaw Mandate the Enforcement of the Arbitration**
5 **Provision in the Terms of Service.**

6 The Federal Arbitration Act (“FAA”) establishes the validity and enforceability of written
7 agreements to arbitrate disputes. 9 U.S.C. § 1 *et seq.* “The ‘principal purpose’ of the FAA is to
8 ‘ensur[e] that private arbitration agreements are enforced according to their terms.’” *AT&T*
9 *Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). As a result, the FAA
10 makes arbitration agreements “valid, irrevocable, and enforceable” as written (subject to a saving
11 clause); requires courts to stay litigation of arbitral claims pending arbitration of those claims “in
12 accordance with the terms of the agreement”; and requires courts to compel arbitration “in
13 accordance with the terms of the agreement” upon the motion of either party to the agreement. 9
14 U.S.C §§ 2–4.

15 Because arbitration is a highly favored means of settling disputes, arbitration agreements
16 “must be rigorously enforced.” *Pavlina v. Safeco Ins. Co. of Am.*, No. 12-CV-534-LHK, 2012 WL
17 5412796, at *4 (N.D. Cal. Nov. 6, 2012) (quoting *Perry v. Thomas*, 482 U.S. 483, 490 (1987)).
18 Indeed, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Supreme Court
19 declared:

20 The Arbitration Act establishes that, as a matter of federal law, any
21 doubts concerning the scope of arbitrable issues should be resolved
22 in favor of arbitration, whether the problem at hand is the
23 construction of the contract language itself or an allegation of waiver,
24 delay or like defense to arbitrability.

25 460 U.S. 1, 24–25 (1983).

26 Furthermore, the burden of proving the claims at issue are unsuitable for arbitration lies
27 with the party resisting arbitration. *Munro v. Univ. of S. Cal.*, 896 F.3d 1088, 1091 (9th Cir. 2018)
28 (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

29
29 ² Plaintiffs also allege as factual background that Getaround “breached its contract” by renting
30 the previously stolen vehicle to Mr. Hofer. Compl., ¶ 55.

1 **B. The Parties Expressly Agreed To Arbitrate Any Claims Between Them.**

2 To enforce an arbitration agreement, the Court need only determine whether the parties have
3 entered into a valid agreement to arbitrate the dispute. *See Munro*, 896 F.3d at 1091 (quoting *Cox*
4 *v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008)) (“The FAA limits courts’
5 involvement to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2)
6 whether the agreement encompasses the dispute at issue.”); *Rahimi v. Nintendo of Am., Inc.*, 936 F.
7 Supp. 2d 1141, 1143 (N.D. Cal. 2013) (“The FAA leaves no place for the exercise of discretion by
8 a district court, but instead mandates that district courts shall direct the parties to proceed to
9 arbitration on issues with respect to which a valid arbitration agreement exists”) (internal quotations
10 and citations omitted). The validity inquiry examines the contract in its entirety, which “may be
11 invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.”
12 *Lara v. Onsite Health, Inc.*, 896 F. Supp. 2d 831, 838 (N.D. Cal. 2012).

13 Here, Mr. Hofer created a user account on the Getaround platform and thereby agreed to be
14 bound by the ToS. Kadillak Decl., ¶ 4. The ToS expressly provides for mandatory arbitration of
15 all disputes arising therefrom. Kadillak Decl., ¶ 6, Ex. B. In addition, the ToS is valid and includes
16 within its scope the issues in this lawsuit. *See id.* Accordingly, this Court should order the Plaintiffs
17 and Getaround to arbitrate this dispute.

18 **1. The Terms of Service Is a Valid Agreement Containing an Arbitration
19 Agreement.**

20 The ToS satisfies the requirements of a valid contract. To determine contract validity,
21 courts generally apply ordinary state law contract principles. *Ingle v. Circuit City Stores, Inc.*, 382
22 F.3d 1165, 1170 (9th Cir. 2003). Under California law, a contract is valid if there is mutual assent
23 between the parties and valid consideration. *Craig v. Brown & Root, Inc.*, 84 Cal. App. 4th 416,
24 420 (2000) (noting that general contract law principles determine whether arbitration agreement is
25 binding); *see also Div. of Labor Enforcement v. Transpacific Trans. Co.*, 69 Cal. App. 3d 268, 274–
26 75 (1977) (stating mutual assent and consideration as elements of valid contract).

27 Here, by creating a user account, Mr. Hofer agreed to the terms of service. Kadillak Decl.,
28 ¶ 4. The ToS expressly provides that both parties agree “to resolve any claim, dispute, or

1 controversy . . . arising out of or in connection with or relating to this Agreement, or the breach or
2 alleged breach thereof (collectively, “Claims”), by binding arbitration.” Kadillak Decl., ¶ 6, Ex. B.
3 Moreover, Plaintiffs concede the existence of a valid contract by alleging in the Complaint that
4 Getaround “breached its contract with Brian.” Compl., ¶ 55.

5 In any event, any dispute regarding the validity of the agreement to arbitrate must be decided
6 by the arbitrator, not the Court. The ToS states that the binding arbitration will be conducted by
7 “the American Arbitration Association (‘AAA’) in City and County of San Francisco, California
8 under the commercial rules then in effect of the AAA.” Kadillak Decl., Ex. B. Rule 7(a) of the
9 AAA’s Commercial Arbitration Rules explicitly covers disputes regarding the arbitrator’s
10 jurisdiction and the validity of the arbitration agreement: “The arbitrator shall have the power to
11 rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or
12 validity of the arbitration agreement or the arbitrability of any claim or counterclaim.” Numerous
13 courts in and including the Ninth Circuit have held that a “reference to the AAA rules constitutes
14 clear and unmistakable evidence of the intent to arbitrate arbitrability.” *Diaz v. Intuit, Inc.*, No.
15 5:15-CV-01778-EJD, 2017 WL 4355075, at *3 (N.D. Cal. Sept. 29, 2017); *see also Oracle Am., Inc. v. Myriad Grp. A.G.*, 724 F.3d 1069, 1074–75 (9th Cir. 2013) (“Virtually every circuit to have
16 considered the issue has determined that incorporation of the American Arbitration Association’s
17 (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to
18 arbitrate arbitrability.”); *Fadal Machining Ctrs., LLC v. Compumachine, Inc.*, 461 F. App’x 630,
19 632 (9th Cir. 2011) (“arbitration clause clearly and unmistakably delegated the question of
20 arbitrability to the arbitrator” because it incorporated AAA’s rules, “which provide that ‘[t]he
21 arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with
22 respect to the existence, scope or validity of the arbitration agreement’”); *Laguna v. Coverall N. Am., Inc.*, No. 09cv2131-JM, 2011 WL 3176469, at *4 (S.D. Cal. July 26, 2011) (“By explicitly
23 incorporating the AAA rules, courts routinely hold that the parties clearly and unmistakably agreed
24 that questions of arbitrability would be submitted to arbitration for resolution.”).
25
26

2. The Claim Against Getaround Falls Within the Scope of the Arbitration Agreement.

The ToS explicitly informs all users like Mr. Hofer that “any claim, dispute, or controversy . . . arising out of or in connection with or relating to this Agreement, or the breach or alleged breach thereof” will be resolved by “binding arbitration.” Kadillac Decl. ¶ 6, Ex. B. The inclusion of “any claim, dispute, or controversy” is the broadest language possible and establishes intent to include *all* disputes. *See Bono v. David*, 147 Cal. App. 4th 1055, 1067 (2007) (citing California Practice Guide: Alternative Dispute Resolution’s discussion of “broad” and “narrow” arbitration clauses, noting that “any claim arising out of or relating to” is “very broad”); *see also Dream Theater, Inc. v. Dream Theater*, 124 Cal. App. 4th 547, 554 n.1 (2004) (same); *Simula Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999) (concluding “factual allegations need only ‘touch matters’ covered by the contract containing the arbitration clause and all doubts are to be resolved in favor of arbitrability”) (internal citations omitted). By accepting the Terms of Service through his use of the Getaround platform, Mr. Hofer agreed to binding arbitration of *any* claims arising out of or in connection with or relating to the ToS. Plaintiffs’ negligence claim in this action directly arises out of Getaround’s purported duty to Plaintiffs based on Mr. Hofer’s rental of a vehicle on the Getaround platform. The claim therefore necessarily “aris[es] out of or in connection with or relat[es] to” his contractual relationship with Getaround as a user of its platform and is subject to the arbitration provision. Accordingly, the Court should order Plaintiffs to arbitrate their claims against Getaround.

C. Getaround Should Be Dismissed from the Litigation or, in the Alternative, the Claims Against It Should Be Stayed Pending Completion of the Arbitration.

22 Under the FAA, where all claims asserted in a complaint as to one defendant must be
23 submitted to arbitration, a court has the discretion to dismiss the action in its entirety as to that
24 defendant. *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 638 (9th Cir. 1988); *Castaldi v.*
25 *Signature Retail Servs., Inc.*, No. 15-CV-00737-JSC, 2016 WL 7042991, at *1 (N.D. Cal. Jan. 20,
26 2016) (“Courts in this District regularly dismiss actions after granting motions to compel arbitration
27 where all of the plaintiff’s claims were subject to arbitration.”). The lone cause of action against

1 Getaround is based upon a duty Getaround purportedly owes to Mr. Hofer in connection with his
2 rental through Getaround, *see* Compl. ¶ 80, and as such, falls squarely within the scope of the ToS
3 and its arbitration agreement. Getaround thus respectfully requests that the Court dismiss
4 Getaround from this action with prejudice and compel Plaintiffs to arbitrate their claim. In the
5 alternative, if the Court declines to dismiss Getaround, Getaround seeks an order staying this action.
6 *See* 9 U.S.C. § 3 (requiring courts, at a party's request, to stay judicial proceedings when an issue
7 raised in a pending lawsuit is referable to arbitration pursuant to a written arbitration agreement).

8 **V. CONCLUSION**

9 For the foregoing reasons, Defendant Getaround respectfully requests that this Court grant
10 Getaround's Motion to Compel Arbitration of this matter and enter an order dismissing the action
11 with prejudice as to Getaround or staying the matter pending arbitration.

12
13 Dated: July 10, 2019

DARREN S. TESHIMA
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14
15
16 By: /s/ Darren S. Teshima
17 DARREN S. TESHIMA
18 Attorneys for Defendant
GETAROUND INC.